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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2009 JUN 15 A 9 30

June 15, 2009

**AGENDA ITEM**  
For Meeting of: 06-18-2009

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Joshua S. Blume *JSB*  
Attorney

Subject: Draft AO 2009-11 (Senator John Kerry)

**SUBMITTED LATE**

Attached are two proposed alternative drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for June 18, 2009.

Attachment

## **AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

Two Alternative DRAFTS of ADVISORY OPINION 2009-11 are available for public comments under this procedure. It was requested by Marc E. Elias, Esq. and Kate S. Keane, Esq on behalf of Senator John Kerry and the John Kerry for Senate Committee.

Two alternative Drafts of Advisory Opinion 2009-11 are scheduled to be on the Commission's agenda for its public meeting of Thursday, June 18, 2009.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on June 17, 2009.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

**CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2009-11, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at [www.fec.gov](http://www.fec.gov).

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

**MAILING ADDRESSES**

Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Rosemary C. Smith  
Associate General Counsel  
Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

3 Mr. Marc E. Elias, Esq.  
4 Ms. Kate S. Keane, Esq.  
5 Perkins Coie LLP  
6 607 Fourteenth Street, N.W.  
7 Washington, D.C. 20005-2003

8 Dear Mr. Elias and Ms. Keane:

9 We are responding to your advisory opinion request on behalf of Senator John  
10 Kerry and his authorized committee, the John Kerry for Senate Committee (the  
11 “Committee”), concerning the application of the Federal Election Campaign Act of 1971,  
12 as amended (the “Act”), and Commission regulations to the Committee’s proposed  
13 provision of campaign funds to the White Mountain Films company (“WMF”) to help it  
14 produce a documentary film, for which Senator Kerry will serve as an uncompensated  
15 executive producer.

16 The Commission concludes that the Committee’s proposed provision of campaign  
17 funds represents a transfer of funds for investment purposes. Consequently, the  
18 Committee may proceed with this proposal.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter dated  
21 March 16, 2009, an e-mail message received on April 24, 2009, telephone conversations  
22 with Commission attorneys, and information available on public websites.

23 WMF is a limited liability company (“LLC”) that is solely owned by George  
24 Butler. It is treated as a sole proprietorship for income tax purposes. John Kerry is a  
25 United States Senator and the Committee is his authorized campaign committee. WMF is  
26 seeking funding to produce a documentary film tentatively titled “Keeping Faith.” The

1 film's subject would be soldiers in Iraq and the effects upon them of a certain type of  
2 wound. The film would not expressly advocate the election or defeat of any political  
3 candidate, nor would it promote, attack, support, or oppose any political candidate.

4 WMF has negotiated two agreements with the Committee and with Senator Kerry,  
5 respectively.<sup>1</sup> The agreement with the Committee ("Committee Agreement") concerns  
6 the Committee's provision of \$300,000 to WMF to partly defray the film's development  
7 expenses, which may include expenses associated with research, travel, and the  
8 preparation of a printed story proposal ("Proposal"). *Committee Agreement, para. 3.*  
9 The agreement with Senator Kerry ("Kerry Agreement") sets out Senator Kerry's rights  
10 and responsibilities with respect to his role as an executive producer of the film.<sup>2</sup> *See*  
11 *Kerry Agreement, para. 3; see also Committee Agreement, para. 1.* The two agreements  
12 are independent of each other in that failure to execute the Committee Agreement will not  
13 impede the execution of the Kerry Agreement. Further, although the Committee  
14 Agreement appears to make half of the Committee's proposed payment to WMF  
15 contingent upon submission of the Proposal to Senator Kerry, Senator Kerry and the  
16 Committee indicate that if Senator Kerry does not become an executive producer, then  
17 this provision of the Committee Agreement will be amended to eliminate the reference to  
18 Senator Kerry.

19 The Committee Agreement provides that the Committee will pay the \$300,000 in  
20 three installments. *Committee Agreement, para. 3.* Half of this sum, or \$150,000, is

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<sup>1</sup> Copies of these agreements are included with the request. They may be accessed at the Commission's website at <http://saos.nictusa.com/saos/searchao>.

<sup>2</sup> Senator Kerry's service as an executive producer is contingent upon approval from the Senate Ethics Committee, which Senator Kerry is currently seeking.

1 payable on execution of the agreement. *Id.* The second installment of \$90,000 is payable  
2 upon submission of the initial draft of the Proposal to Senator Kerry and to David  
3 Thorne, another producer. *Id.* The third and final installment of \$60,000 is payable upon  
4 submission of a completed and approved Proposal to Senator Kerry and David Thorne.  
5 *Id.* Senator Kerry will not receive any fee or other compensation in exchange for the  
6 funds the Committee would provide to WMF. *Id.*

7         The Committee and WMF estimate that the overall budget for the film will be  
8 between 3 and 5 million dollars. *Committee Agreement, para. 4.* Consequently, there is  
9 a risk that the film will not be produced because of insufficient funds. *Committee*  
10 *Agreement, para. 8.* The Committee will be entitled to receive a one-time payment of  
11 120 percent of the total funds it provided to WMF once WMF raises enough money to  
12 produce the film and has actually produced the film. *Committee Agreement, para. 5.*<sup>3</sup>

13         The Committee will not have any right, title, or interest in or to the film, as these  
14 are held solely by WMF. *Committee Agreement, paras. 2, 6.* WMF and the Committee  
15 do have the option of forming a single-purpose LLC, however, to which WMF may  
16 assign its right, title and interest in and to the film. *Committee Agreement, para. 2.*

17         The Kerry Agreement provides that Senator Kerry will render all services  
18 customarily rendered by executive producers of first-class theatrical motion pictures  
19 subject to the instructions and directions of WMF. *Kerry Agreement, para. 3.1.*  
20 Specifically, Senator Kerry's services include, among other things: (i) making  
21 introductions with respect to potential investors; (ii) reviewing and providing comments

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<sup>3</sup> This rate of return is comparable both to the rate of return that WMF will offer to others who provide funding for this film, and to the rates of return WMF typically offers to those who provide similar funding for other films.

1 on various written renderings of the film; (iii) helping the producers obtain interview  
2 subjects for the film; and (iv) helping to prepare the budget. *Id.* Subject to WMF's  
3 creative and business control, and in conjunction with David Thorne, Senator Kerry will  
4 have the right to approve various aspects of the film. These include: the Proposal; the  
5 treatment; the interview subjects who will appear; the investors; all paperwork to be  
6 executed by the investors; the production partners of the film, including sponsors; the  
7 budget; and the distributors of the film. *Kerry Agreement, para. 3.2.* Senator Kerry will  
8 also have the right to seek and obtain sponsors. *Kerry Agreement, para. 5.*

9 In consideration for his services, Senator Kerry will be entitled to receive an  
10 executive producer credit in the film, as well as in the "billing block" of paid advertising  
11 of the film under certain conditions. *Kerry Agreement, para. 6.* Apart from this  
12 consideration, Senator Kerry will not have any right, title or interest in or to the film.  
13 *Kerry Agreement, para. 7.* However, the Kerry Agreement allows WMF and Senator  
14 Kerry to form a single-purpose LLC, to which WMF may assign its right, title, and  
15 interest in and to the film. *Kerry Agreement, para. 2.*

16 The Committee will report any payment it receives from WMF in a timely  
17 manner in accordance with the disclosure provisions of the Act and Commission  
18 regulations. In addition, the Committee will deposit the funds it receives from WMF in  
19 its campaign depository account before using them to make expenditures.

#### 20 ***Question Presented***

21 *May the Committee provide campaign funds to WMF for its use in producing a*  
22 *documentary film?*

1 ***Legal Analysis and Conclusions***

2 Yes, the Committee may provide campaign funds to WMF for its use in  
3 producing a documentary film.

4 The Act and Commission regulations require a political committee to designate at  
5 least one State bank, Federally-chartered depository institution, or other depository  
6 institution with accounts insured by a specifically identified Federal insurance entity, as  
7 its campaign depository. 2 U.S.C. 431(h)(1) and 11 CFR 103.2. Political committees  
8 must make all their disbursements from their campaign depositories, and any funds they  
9 receive must first be deposited in their campaign depositories before they may  
10 subsequently be disbursed. 2 U.S.C. 431(h)(1) and 11 CFR 103.3(a).

11 Commission regulations also provide that political committees may transfer funds  
12 from their campaign depositories “for investment purposes,” and such funds must be re-  
13 deposited in the campaign depositories before they may be disbursed for other purposes.  
14 11 CFR 103.3(a). This provision reflects the longstanding position of the Commission,  
15 as manifested in several advisory opinions, that political committees may transfer  
16 campaign funds from their depositories to various kinds of investment vehicles for  
17 investment purposes. *See* Advisory Opinions 1999-08 (Specter), 1997-06 (Hutchison),  
18 1986-18 (Bevill), 1980-39 (Fluor-PAC), 1976-25 (Bevill), and 1975-41 (Shuster for  
19 Congress). The advisory opinions conclude that such transfers are not “expenditures”  
20 under the Act and Commission regulations. *Id.*

21 Section 103.3(a) does not define the term “investment,” nor does a definition of  
22 “investment” appear elsewhere in the regulations. In the absence of a statutory or  
23 regulatory definition of a term, the Commission considers it reasonable to begin its

1 analysis by following the practice of many courts and to look for guidance first to the  
2 term's common, ordinary and accepted, or "plain," meaning. See 2A Norman J. Singer &  
3 J.D. Shambie Singer, Sutherland Statutes and Statutory Construction § 46:1 (7<sup>th</sup> ed.  
4 2007); see also *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356-58 (1994). A term's  
5 plain meaning may be gleaned from such sources as a dictionary of common usage. *Id.*,  
6 at 357-58. Generally, resolution of the plain meaning of a term or provision will also end  
7 the inquiry unless applying the plain meaning produces an "odd" result, or a result that is  
8 at odds with the intention of the drafters of the provision. See, e.g., *Green v. Bock*  
9 *Laundry Machine Co.*, 490 U.S. 504, 509-10 (1989); *Griffin v. Oceanic Contractors, Inc.*,  
10 458 U.S. 564, 571 (1982).

11 The Commission notes that some definitions of "investment" are, in pertinent  
12 part: (1) "the investing of money or capital in order to gain profitable returns, as interest,  
13 income, or appreciation in value," Random House Webster's Unabridged Dictionary  
14 1004 (2<sup>nd</sup> Ed. 2001);<sup>4</sup> and (2) "An expenditure to acquire property or assets to produce  
15 revenue; a capital outlay," Black's Law Dictionary 844-45 (8<sup>th</sup> Ed. 2004).

16 Given the plain meaning of the term "investment," as indicated by the above  
17 sources, the Commission concludes that the Committee's proposed provision of  
18 campaign funds to WMF under the terms set forth in the Committee Agreement qualifies  
19 as an investment under 11 CFR 103.3(a). The sum of \$300,000 that the Committee  
20 proposes to spend could be seen as a "capital outlay" by the Committee, made for the  
21 purpose of gaining "profitable returns" in the form of "future income" or "appreciation in

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<sup>4</sup> The same source defines the term "invest" as "to put (money) to use, by purchase or expenditure, in something offering potential profitable returns, as interest, income, or appreciation in value." *Id.*

1 value,” these being the anticipated return of 120 percent of its total outlay. Insofar as  
2 nothing about the application of the plain meaning of “investment” to the regulation  
3 appears to produce absurd or otherwise illogical results, it follows that it is unnecessary  
4 to go further. Thus, the Committee’s provision of campaign funds to WMF based on its  
5 anticipation of an eventual profitable return qualifies as a “transfer of funds for  
6 investment purposes.” 11 CFR 103.3(a). It is therefore not an “expenditure.”  
7 Furthermore, because the Committee’s provision of campaign funds to WMF qualifies as  
8 a transfer of funds for investment purposes and so long as Senator Kerry will not benefit  
9 personally from the investment, the provision of campaign funds does not represent a  
10 conversion of campaign funds to personal use, which is prohibited under 2 U.S.C.  
11 439a(b)(1) and 11 CFR 113.2.

12 The Commission notes that Senator Kerry’s role as an executive producer of the  
13 film, including his consultation and approval rights through various stages of the film’s  
14 development, from Proposal to final distribution, does not preclude the Committee from  
15 investing campaign funds in WMF. However, it is possible that if Senator Kerry  
16 exercises his right under the agreement to form a single-purpose LLC with WMF, to  
17 which WMF assigns its right, title, and interest in and to the film, then Senator Kerry  
18 might acquire a right to receive from the LLC a distribution of a portion of the profits that  
19 the LLC may derive from the film. Should this in fact be the case, then the Committee  
20 would be investing campaign funds for the possible personal benefit of Senator Kerry,  
21 which would constitute an impermissible conversion of campaign funds to personal use.

22 The acceptability of the Committee’s proposal as an investment is also contingent  
23 upon the Committee’s re-depositing of any proceeds it acquires from WMF as a result of

1 the investment into its depository before using such proceeds for subsequent  
2 disbursements or expenditures. *See* 11 CFR 103.3(a).

3 For these reasons, the Commission concludes that Senator Kerry and the  
4 Committee may implement their proposal to provide campaign funds to WMF for use in  
5 connection with the production of a documentary film. The Commission notes that the  
6 Committee, in preparing its reports, should clearly report any proceeds received from its  
7 investment in WMF's film.<sup>5</sup> Specifically, the amount received should be reported on  
8 Schedule A, supporting Line 15 of the Committee's Form 3. If the committee suffers a  
9 loss on the investment, it should report the loss on Schedule A, supporting Line 15 as a  
10 negative entry or receipt.

11 This response constitutes an advisory opinion concerning the application of the  
12 Act and Commission regulations to the specific transaction or activity set forth in your  
13 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
14 of the facts or assumptions presented and such facts or assumptions are material to a  
15 conclusion presented in this advisory opinion, then the requester may not rely on that  
16 conclusion as support for its proposed activity. Any person involved in any specific  
17 transaction or activity which is indistinguishable in all its material aspects from the  
18 transaction or activity with respect to which this advisory opinion is rendered may rely on  
19 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions  
20 in this advisory opinion may be affected by subsequent developments in the law  
21 including, but not limited to, statutes, regulations, advisory opinions and case law. All

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<sup>5</sup> The Committee should not report as disbursements any investment payments made. The funds the Committee invests are still considered an asset, and as such, should be reflected in their cash on hand balance. Reporting a disbursement for an investment would lower the cash on hand balance and understate the Committee's net assets.

1 cited advisory opinions are available on the Commission's website at

2 <http://saos.nictusa.com/saos/searchao>.

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4  
5  
6  
7

On behalf of the Commission,

Steven T. Walther  
Chairman

**DRAFT B**

2  
3 Mr. Marc E. Elias, Esq.  
4 Ms. Kate S. Keane, Esq.  
5 Perkins Coie LLP  
6 607 Fourteenth Street, N.W.  
7 Washington, D.C. 20005-2003

8 Dear Mr. Elias and Ms. Keane:

9 We are responding to your advisory opinion request on behalf of Senator John  
10 Kerry and his authorized committee, the John Kerry for Senate Committee (the  
11 “Committee”), concerning the application of the Federal Election Campaign Act of 1971,  
12 as amended (the “Act”), and Commission regulations to the Committee’s proposed  
13 provision of campaign funds to the White Mountain Films company (“WMF”) to help it  
14 develop a documentary film, for which Senator Kerry will serve as an uncompensated  
15 executive producer.

16 The Commission concludes that the Committee’s proposed provision of campaign  
17 funds would not be a “transfer of funds for investment purposes” under 11 CFR 103.3(a)  
18 and, when analyzed as a “use” of campaign funds under the Act, would result in a  
19 prohibited personal use of campaign funds by the Committee. Consequently, the  
20 Committee may not proceed with this proposal.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter dated  
23 March 16, 2009, an e-mail message received on April 24, 2009, telephone conversations  
24 with Commission attorneys, and information available on public websites.

1 WMF is a limited liability company (“LLC”) that is solely owned by George  
2 Butler. It is treated as a sole proprietorship for Federal income tax purposes. John Kerry  
3 is a United States Senator and the Committee is his authorized campaign committee.  
4 WMF is seeking funding to produce a documentary film tentatively titled “Keeping  
5 Faith.” The film’s subject would be soldiers in Iraq and the effects upon them of a  
6 certain type of wound. The film would not expressly advocate the election or defeat of  
7 any candidate, nor would it promote, attack, support, or oppose any candidate.

8 WMF has negotiated two agreements with the Committee and with Senator Kerry,  
9 respectively.<sup>1</sup> The agreement with the Committee (“Committee Agreement”) concerns  
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11 film’s development expenses, which may include expenses associated with research,  
12 travel, and the preparation of a printed story proposal (“Proposal”). *Committee*  
13 *Agreement, para. 3.* The agreement with Senator Kerry (“Kerry Agreement”) sets out  
14 Senator Kerry’s rights and responsibilities with respect to his role as an executive  
15 producer of the film.<sup>2</sup> *See Kerry Agreement, para. 3; see also Committee Agreement,*  
16 *para. 1.* The two agreements are independent of each other in that failure to execute the  
17 Committee Agreement will not impede the execution of the Kerry Agreement. Further,  
18 although the Committee Agreement appears to make half of the Committee’s proposed  
19 payment to WMF contingent upon submission of the Proposal to Senator Kerry, Senator  
20 Kerry and the Committee represent that if Senator Kerry does not become an executive

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<sup>1</sup> Copies of these agreements are included with the request and are available through the Commission’s website at [www.fec.gov](http://www.fec.gov) or <http://saos.nictusa.com/saos/searchao>.

<sup>2</sup> Senator Kerry’s service as an executive producer is contingent upon approval from the Senate Ethics Committee, which Senator Kerry is currently seeking.

1 producer, then this provision of the Committee Agreement will be amended to eliminate  
2 the reference to Senator Kerry.

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6 upon submission of the initial draft of the Proposal to Senator Kerry and to David  
7 Thorne, another producer. *Id.* The third and final installment of \$60,000 is payable upon  
8 submission of a completed and approved Proposal to Senator Kerry and David Thorne.  
9 *Id.* Senator Kerry will not receive any fee or other compensation in exchange for the  
10 funds the Committee would provide to WMF. *Id.*

11 The Committee and WMF estimate that the overall budget for the film will be  
12 between 3 and 5 million dollars. *Committee Agreement, para. 4.* Consequently, there is  
13 a risk that the film will not be produced because of insufficient funds. *Committee*  
14 *Agreement, para. 8.* The Committee will be entitled to receive a one-time payment of  
15 120 percent or \$360,000 of the total funds it provided to WMF once WMF raises enough  
16 money to produce the film and has actually produced the film. *Committee Agreement,*  
17 *para. 5.*<sup>3</sup> Notably, the 120 percent payment would be made before the film is distributed,  
18 and would be required even if the film is never distributed.

19 The Committee will not have any right, title, or interest in or to the film, as these  
20 are held solely by WMF. *Committee Agreement, paras. 2, 6.* WMF and the Committee

---

<sup>3</sup> This rate of return is comparable both to the rate of return that WMF will offer to others who provide funding for this film and to the rates of return WMF typically offers to those who provide similar funding for other films.

1 do have the option of forming a single-purpose LLC, however, to which WMF may  
2 assign its right, title and interest in and to the film. *Committee Agreement, para. 2.*

3 The Kerry Agreement provides that Senator Kerry will render all services  
4 customarily rendered by executive producers of first-class theatrical motion pictures  
5 subject to the instructions and directions of WMF. *Kerry Agreement, para. 3.1.*

6 Specifically, Senator Kerry's services include, among other things: (i) making  
7 introductions with respect to potential investors; (ii) reviewing and providing comments  
8 on various written renderings of the film; (iii) helping the producers obtain interview  
9 subjects for the film; and (iv) helping to prepare the budget. *Id.* Subject to WMF's  
10 creative and business control, and together with David Thorne, Senator Kerry will have  
11 the right to approve various aspects of the film. These include: the Proposal; the  
12 treatment; the interview subjects who will appear; the investors; all paperwork to be  
13 executed by the investors; the production partners of the film, including sponsors; the  
14 budget; and the distributors of the film. *Kerry Agreement, para. 3.2.* Senator Kerry will  
15 also have the right to seek and obtain sponsors. *Kerry Agreement, para. 5.*

16 In consideration for his services, Senator Kerry will be entitled to receive an  
17 executive producer credit in the film, as well as in the "billing block" of paid advertising  
18 of the film under certain conditions. *Kerry Agreement, para. 6.* Apart from this  
19 consideration, Senator Kerry will not have any right, title or interest in or to the film.  
20 *Kerry Agreement, para. 7.* However, the Kerry Agreement allows WMF and Senator  
21 Kerry to form a single-purpose LLC, to which WMF may assign its right, title, and  
22 interest in and to the film. *Kerry Agreement, para. 2.*

1           The Committee will report any funds it receives from WMF in a timely manner in  
2 accordance with the disclosure provisions of the Act and Commission regulations. In  
3 addition, the Committee will deposit the funds it receives from WMF in its campaign  
4 depository account before using them to make expenditures.

5           ***Question Presented***

6           ***May the Committee provide campaign funds to WMF for its use in producing a***  
7 ***documentary film?***

8           ***Legal Analysis and Conclusions***

9           No, the Committee may not provide campaign funds to WMF for its use in raising  
10 funds to produce a documentary film because under Commission regulations at 11 CFR  
11 103.3(a), this transaction would not be a “transfer of funds for investment purposes” from  
12 its campaign depository, and, when treated as a “use” of campaign funds under the Act,  
13 would result in the Committee converting campaign contributions to its personal use.

14           The Act and Commission regulations require a political committee to designate at  
15 least one State bank, Federally-chartered depository institution, or other depository  
16 institution with accounts insured by a specifically identified Federal insurance entity, as  
17 its campaign depository. 2 U.S.C. 431(h)(1) and 11 CFR 103.2. Political committees  
18 must make all their disbursements from their campaign depositories, and any funds they  
19 receive must first be deposited in their campaign depositories before they may  
20 subsequently be disbursed. 2 U.S.C. 431(h)(1) and 11 CFR 103.3(a).

21           Commission regulations also provide that political committees may transfer funds  
22 from their campaign depositories “for investment purposes,” and such funds must be re-  
23 deposited in the campaign depositories before they may be disbursed for other purposes.

1 11 CFR 103.3(a). Although Commission regulations do not define “investment,” the  
2 Commission has permitted political committees to transfer campaign funds to  
3 investments such as mutual funds, bond funds, money market funds, government  
4 securities, and Treasury notes. *See* Advisory Opinions 1999-08 (Specter), 1997-06  
5 (Hutchison), 1986-18 (Bevill), 1980-39 (Fluor-PAC), 1976-25 (Bevill), and  
6 1975-41 (Shuster for Congress).

7 If the proposed transfer of funds to WMF qualifies as an “investment” under  
8 Section 103.3(a), the transfer would be treated as an exchange of one form of “cash on  
9 hand” to another, and thus not a “use” of campaign funds under the Act. 11 CFR  
10 103.3(a). If, however, the provision of funds does not qualify as an “investment,” the  
11 proposed transfer of funds would then constitute a “use” of campaign funds by the  
12 Committee and section 439a(b) of the Act prohibits the Committee from converting  
13 campaign funds to “personal use” by using the funds to “fulfill any commitment,  
14 obligation or expense of a person that would exist irrespective of the [Kerry]’s election  
15 campaign or [Kerry]’s duties as a holder of Federal office.” 2 U.S.C. 439a(b).

16 *Investment of Campaign Funds*

17 By providing campaign funds to WMF, the Committee would be actively engaged  
18 in a speculative business venture of producing a documentary film, rather than making an  
19 “investment” as that term is used in Commission’s regulations,

20 As stated above, the Commission has previously permitted political committees to  
21 transfer campaign funds to make investments such as mutual funds, bond funds, money  
22 market funds, government securities, and Treasury notes, without treating such  
23 “investments” as a “use” of campaign funds. *See* Advisory Opinions 1999-08 (Specter),

1 1997-06 (Hutchison), 1986-18 (Bevill), 1980-39 (Fluor-PAC), 1976-25 (Bevill), and  
2 1975-41 (Shuster for Congress). In these advisory opinions, the Commission concluded  
3 that transfers of funds from campaign depositories to these different kinds of investment  
4 accounts need not be treated as “expenditures” under the Act and Commission  
5 regulations because such transfers represent a conversion of one form of “cash on hand”  
6 to another. *See* Advisory Opinions 1999-08 (Specter), 1997-06 (Hutchison), 1980-39  
7 (Fluor-PAC), and 1975-41 (Shuster for Congress). Thus, campaign funds continue to be  
8 “cash on hand” while invested in these accounts. Under 11 CFR 104.3(a)(1), “cash on  
9 hand” includes “currency; balance on deposit in banks, savings and loan institutions, and  
10 other depository institutions; traveler’s checks owned by the committee; certificates of  
11 deposit, treasury bills and any other committee investments valued at cost.” 11 CFR  
12 104.3(a)(1).

13 Because the funds the Committee would provide to WMF do not qualify as one of  
14 the specific types of cash on hand set forth in section 104.3(a)(1), the Commission must  
15 determine whether they qualify as an “other committee investment[] valued at cost”  
16 under 11 CFR 104.3(a)(1). For the following reasons, the Commission concludes that the  
17 proposed transaction does not so qualify.

18 The nature of the proposed transaction in this case is not comparable to that of the  
19 specific kinds of investments enumerated in the regulation.<sup>4</sup> Currency, deposits in

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<sup>4</sup> The Commission does not interpret statutory or regulatory language in a vacuum, but is guided by longstanding canons of statutory construction. The relevant rule here is that of *ejusdem generis*, meaning “of the same kind.” 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction § 47:17 (7<sup>th</sup> ed. 2007). Under this rule, “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Id.* *See also Hall Street Associates, L.L.C. v. Mattel,*

1 financial institutions, traveler's checks, and savings coupons are not comparable to the  
2 development funds here. The enumerated investments are all in a "liquid" form, like  
3 balances in a campaign depository, or are readily convertible into such a form.<sup>5</sup> While  
4 such investments may fluctuate in value, they are in a form designed to be continuously  
5 available or "on hand" to the investor. In contrast, the \$300,000 the Committee would  
6 provide to WMF will be used to pay film development expenses upon receipt. These  
7 funds are not maintained in some form of ongoing "balance" with WMF for the duration  
8 of the investment, and thus would not in any recognizable sense remain "cash on hand" to  
9 the Committee after they are provided to WMF. Further, because the funds would not  
10 remain as "cash on hand," whether in some kind of account or similar form, they have no  
11 ongoing ascertainable "book value" as the enumerated investments do. Finally, in each  
12 type of "cash on hand" enumerated in 11 CFR 104.3(a)(1) the funds remain liquid and  
13 may be traded in an established market, whereas nothing in the contract indicates that the  
14 funds the Committee would provide WMF and the Committee's contractual entitlement  
15 to receive a one-time payment of 120 percent of the total funds it provided to WMF once  
16 WMF actually produced the film would be transferable or could readily be converted  
17 back to cash for campaign use. Additionally, the Committee's contractual right to  
18 payment at some later date cannot be traded on any open market.

19           These features of the Committee's proposal suggest that, rather than making an  
20 investment, the Committee, both through its own funding and through Senator Kerry's

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*Inc.*, 128 S.Ct. 1396, 1404 (2008) (when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.).

<sup>5</sup> Similarly, section 104.12, as noted, refers to a cash on hand "balance," consisting of recently received contributions. 11 CFR 104.12.

1 role as an executive producer, would be actively engaged in the speculative business  
2 enterprise of producing a documentary film. Anytime a candidate committee uses its  
3 funds in a way that deprives the candidate of the use of campaign funds in the event those  
4 funds are needed for campaign purposes cannot be considered the type of investment  
5 permissible under the Commission's regulations. Here the funds cannot be easily  
6 retrieved when the campaign needs them and therefore the investment is beyond the  
7 boundaries of what the Commission has permitted in the past. For these reasons, the  
8 Commission does not consider the Committee's proposed provision of development  
9 funds to WMF to be an "investment" under Commission regulations. Because the  
10 Committee's proposal to provide funds to WMF would not be an "investment" under  
11 Commission regulations, the provision of funds to WMF would be a "use" under the Act  
12 and Commission regulations and therefore the Commission must determine whether the  
13 spending would a permissible use of campaign funds under 2 U.S.C. 439a.

14 *Conversion of Campaign Contributions to Personal Use*

15 The Act identifies several permissible uses of contributions accepted by a Federal  
16 candidate, including (1) for expenditures in connection with the candidate's campaign for  
17 Federal office; (2) for ordinary and necessary expenses incurred in connection with the  
18 duties of the individual as a holder of Federal office; and (3) for any other lawful  
19 purpose. See 2 U.S.C. 439a(a); see also 2 U.S.C. 439a(b); 11 CFR 113.2. A candidate  
20 has "wide discretion over the use of campaign funds." Final Rule and Explanation and  
21 Justification, Personal Use of Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995)  
22 ("Personal Use E&J"). However, contributions accepted by the candidate may not be  
23 converted by any person to "personal use." 2 U.S.C. 439a(b)(1); 11 CFR 113.1(g) and

1 113.2(e)(5). The Act specifies that conversion to personal use occurs when a  
2 “contribution or amount is used to fulfill any commitment, obligation, or expense of a  
3 person that would exist irrespective of the candidate’s election campaign or individual’s  
4 duties as a holder of Federal office.” 2 U.S.C. 439a(b)(2).

5 Congress adopted this “irrespective test” from Commission regulations on the  
6 subject of personal use when it enacted the Bipartisan Campaign Reform Act of 2002  
7 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002).<sup>6</sup> In its Explanation and  
8 Justification of its Final Rules relating to Personal Use of Campaign Funds, the  
9 Commission explained that “[u]nder this definition, expenses that would be incurred even  
10 if the candidate was not a candidate or officeholder are treated as personal rather than  
11 campaign or officeholder related.” Personal Use E&J, 60 FR 7862, 7863.

12 The Act and Commission regulations also provide a non-exhaustive list of items  
13 that would constitute personal use. See U.S.C. 439a(b)(2)(A)-(I); 11 CFR  
14 113.1(g)(1)(i)(A)-(J). For items not on this list, the Commission makes a determination  
15 on a case-by-case basis whether an expense would fall within the definition of “personal  
16 use.” 11 CFR 113.1(g)(1)(ii). The list does not include payments to a film company to  
17 help raise funds for the production of a documentary film and the Commission has not  
18 previously considered whether such provision of funds would constitute personal use  
19 under the Act and Commission regulations.

20 Spending of campaign funds need not benefit the candidate or a member of the  
21 candidate’s family specifically in order to violate the personal use prohibition of

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<sup>6</sup> One of BCRA’s principal sponsors explained that amended 2 U.S.C. 439a “[c]odifies FEC regulations relating to the personal use of campaign funds by candidates.” 148 Cong. Rec. S1993-4 (daily ed. March 18, 2002) (statement of Sen. Feingold).

1 section 439a. Rather, section 439a states that campaign contributions “shall not be  
2 converted *by any person* to personal use.” 2 U.S.C. 439a(b)(1) (emphasis added). *See*  
3 *also* Personal Use E&J, 60 FR at 7864 (“personal use” definition applies to any use of  
4 campaign funds, “regardless of whether the beneficiary is the candidate, a family member  
5 of the candidate, or some other person.”). Thus, the fact that Senator Kerry himself  
6 would not reap any financial benefit from the film’s production is not, by itself,  
7 dispositive.

8       The Committee Agreement would obligate the Committee to provide WMF the  
9 sum of \$300,000 for WMF’s use in paying development expenses to produce a  
10 documentary film dealing with issues faced by United States soldiers serving in Iraq. As  
11 a political committee, the Committee qualifies as a “person” under the Act and  
12 Commission regulations. *See* 2 U.S.C. 431(11) and 11 CFR 100.10.<sup>7</sup>

13       The Commission has long recognized that if a candidate “can reasonably show  
14 that the expense at issue resulted from campaign or officeholder activities, the  
15 Commission will not consider the use to be personal use.” Personal Use E&J, 60 FR  
16 7862, 7867. The Committee has not made such a showing here. In fact, the Committee  
17 has stated only that the transfer of funds to WMF is an investment. As explained above,  
18 Commission regulations permit a committee to make an investment, as that term is used  
19 in Commission regulations, of its campaign funds in limited circumstances where the  
20 committee is converting one form of “cash on hand” to another. Outside of those limited  
21 circumstances, a committee must show that the use of funds is permissible under the Act

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<sup>7</sup> “The term “person” includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.” 2 U.S.C. 431(11).

1 and Commission regulations. Such is not the case here. Thus, implementing the  
2 Committee's proposal would result in the use of campaign contributions to fulfill a  
3 contractual obligation of the Committee ("a person") to WMF that would exist  
4 irrespective of either Senator Kerry's or the Committee's campaign activities,<sup>8</sup> or Senator  
5 Kerry's official duties. *See* 2 U.S.C. 439a(b)(2).<sup>9</sup>

6 Moreover, as a result of the Kerry Agreement, Senator Kerry may eventually form  
7 a single purpose LLC, to which WMF may assign its right, title, and interest in and to the  
8 film. If Senator Kerry is to assume an ownership interest in the LLC that owns the film,  
9 in part as a result of the Committee having provided funds for development of the film,  
10 this too would result in an impermissible "personal use" of campaign funds under  
11 section 439a.

12 Accordingly, the Commission concludes that the arrangement proposed by  
13 Senator Kerry and the Committee would result in a prohibited conversion of campaign  
14 contributions to personal use and is therefore impermissible. 2 U.S.C. 439a(b)(1). For  
15 these reasons, the Commission concludes that Senator Kerry and the Committee may not  
16 implement their proposal to provide campaign funds to WMF for use in connection with  
17 development expenses for a documentary film.

18 This response constitutes an advisory opinion concerning the application of the  
19 Act and Commission regulations to the specific transaction or activity set forth in your

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<sup>8</sup> Senator Kerry was recently re-elected to his position in November 2008. On February 11, 2009, Senator Kerry filed a Statement of Candidacy on FEC Form 2 for the 2014 election with the Commission.

<sup>9</sup> "If campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an officeholder, that use is not personal use. However, if the obligation would exist even in the absence of the candidacy or even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use." *Personal Funds E&J*, 60 FR at 7864.

1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
2 of the facts or assumptions presented and such facts or assumptions are material to a  
3 conclusion presented in this advisory opinion, then the requester may not rely on that  
4 conclusion as support for its proposed activity. Any person involved in any specific  
5 transaction or activity which is indistinguishable in all its material aspects from the  
6 transaction or activity with respect to which this advisory opinion is rendered may rely on  
7 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions  
8 in this advisory opinion may be affected by subsequent developments in the law  
9 including, but not limited to, statutes, regulations, advisory opinions and case law. All  
10 cited advisory opinions are available on the Commission's website at  
11 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther  
Chairman